

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

Policies and Rules
Regarding Minority and
Female Ownership of Mass
Media Facilities

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MM Docket Nos.
94-149 and 91-140

TO THE COMMISSION

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REPLY COMMENTS OF THE MINORITY MEDIA
AND TELECOMMUNICATIONS COUNCIL AND
THE COMMUNICATIONS TASK FORCE

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The Minority Media and Telecommunications Council ("MMTC") and the Communications Task Force ("CTF") respectfully submit these Reply Comments in support of the retention and expansion of policies which would dramatically enhance the opportunities of minorities to own communications properties.

I. Additional Protective Steps Following Adarand

This proceeding is overshadowed by Adarand Constructors, Inc. v. Peña, 63 U.S.L.W. 4523 (U.S., June 12, 1995) ("Adarand") Therein,, the Supreme Court overruled much of Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) ("Metro") and, as shown below, essentially compelled the FCC to undertake a substantial research initiative to defend its minority ownership policies. In April, Congress abolished the tax certificate policy, which was responsible for approximately 2/3 of all minority owned stations. Now Congress is poised to eviscerate the FCC's multiple ownership rules, including the Mickey Leland Rule,^{1/} and possibly much of Section 310(b) as well. These ill-considered proposals will confer on large domestic and foreign companies an even greater competitive headstart against small and minority owned companies.

MMTC commends to the Commission five immediate, procedural steps it can take to preserve and improve the integrity and effectiveness of its minority ownership policies and initiatives.

1. **Impact Statements.** As Congress and the courts cut back on minority opportunity, and as some licensees, seeing deregulatory blood in the water, push the limits of the current

^{1/} 47 CFR §73.3555(e)(i), (ii) and (iii).

rules,^{2/} it is particularly critical that the FCC neither directly nor indirectly take steps which will even further impede minority access to the media. The steps needed to protect minority opportunity in proceedings not explicitly involving minority ownership are not always self-evident. Consequently, to be certain that minority opportunity is protected, a condition precedent to eighth floor review of all rulemaking proposals should be a statement on minority impact.^{3/}

2. Information Gathering. The NPRM, 10 FCC Rcd 2798, 2797 ¶39 (1995) recommends the collection of data on how many minorities own equity or controlling interests in its licensees. Given the need for a diversity study in response to Adarand (as discussed further below), that proposal is particularly appropriate. In light of Adarand, the Commission will also need to take regular (perhaps annual) measurements on whether its ownership policies are effective in fulfilling both their program diversity and remedial goals.^{4/} This type of data should be maintained longitudinally to meet the requirement that an agency constantly review its policies

2/ See, e.g., Newcity Communications of Massachusetts, Inc., 10 FCC Rcd 4985 (1995).

3/ This statement could be made a permanent section of the Commission's Initial Regulatory Flexibility Analysis.

4/ For example, to regularly evaluate the effectiveness of its minority ownership policies in promoting program diversity, the Commission should ask minority owners, and a representative sample of otherwise similar nonminority owners, how they are responding to the community's problems, needs and interests and who (by race and background) they employ to compose and deliver their program service. To regularly evaluate the effectiveness of its policies at remedying discrimination, the Commission could maintain a database on access to information about stations for sale and access to capital, drawn from minority entrepreneurs and otherwise similarly situated nonminority entrepreneurs.

to insure that they remain narrowly tailored to their objectives.

3. **Expedited Processing.** The Commission's 1978 minority ownership policy statement provided for rapid processing of applications filed by minorities.^{5/} Recently, the Mass Media Bureau substantially revised its case management procedures to provide expedited treatment for certain (nearly all nonminority) licensees, including those subject to EEO challenges.^{6/} Thus, it is especially appropriate now that the Commission move minority-filed applications to the head of the processing line, and if need be waive certain of its nonstatutory rules in the interest of expedition.^{7/} In broadcast finance, time is money; thus, substantially expedited processing would be especially responsive to the capital acquisition difficulties faced by minority entrepreneurs.^{8/}

5/ Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC2d 979, 983 (1978).

6/ Public Notice, "Mass Media Bureau Announces Assignment and Transfer Backlog Reduction and New Speed of Service Initiatives," June 15, 1995.

7/ Among the potentially waivable rules, provided that advance public notice of such a waiver is given, are the time limits specified in §§1.45 and 73.3584(a).

8/ MMTC originally advocated expedited processing in its initial Comments, filed May 17, 1995, at 27.

4. Reports on Private Initiatives. Voluntary industry initiatives to assist minority owners can hardly substitute for federal action to foster minority ownership. However, the Commission certainly should do its best to encourage, publicize and promote such efforts, which have occasionally produced valuable results.^{9/} The Commission can easily achieve this by appropriately revising its Annual Employment Report form (Form 395).

5. Advisory Committee. The national civil rights organizations have long advocated the creation of a permanent advisory committee to assist the Commission in developing, researching and maintaining its minority ownership policies. See Petition for Rulemaking on Minority Ownership, filed by the NAACP, LULAC, NHMC and NBMC, September 18, 1991, at 5 (no "RM" number assigned). There is no more opportune time than now to create such a body. The Small Business Advisory Committee has disbanded, leaving the Commission with no formal source of external review of its policies. As the Commission's experience with the advisory committee on advanced television illustrates, a structured entity with real influence can motivate otherwise uninvolved persons to make a sustained, valuable and voluntary contribution to agency policymaking.

Finally, the Commission should recognize that investors in minority companies relied in good faith on the continued existence of the minority ownership policies. Given the well known capital acquisition difficulties facing minorities in broadcasting,^{10/} even

^{9/} An excellent example is the voluntary assistance provided to Seaway Broadcasting in by Capital Cities/ABC.

^{10/} See generally Minority Ownership in Broadcasting, 92 FCC2d 849 (1982).

the perception that the Commission will not aggressively defend its policies could be disastrous for minority entrepreneurs. Consequently, the Commission, and each individual commissioner,^{11/} should publicly, aggressively, emphatically, frequently and assiduously affirm that the Commission will (1) continue its current minority ownership policies in effect;^{12/} (2) conduct an omnibus diversity study sufficient to permit the Commission to defend all of its existing minority ownership policies; (3) not be dissuaded by the current political climate from developing new minority ownership policies; and (4) stand ready to defend its policies in courts of law and in the court of public opinion.

As shown in MMTC's initial Comments, these policies serve the highly compelling governmental interests of fostering diversity under the First Amendment, remedying past discrimination -- including discrimination validated and ratified by the Commission itself -- and promoting competition in industries essential to democracy, commerce, culture and defense. The Commission's minority initiatives impose few constraints on opportunities for nonminorities, are narrowly tailored, and are highly cost-effective. They can, must and shall survive.

^{11/} An excellent example of the kind of statement we have in mind is the superb Concurring Statement of Commissioner Andrew C. Barrett in Implementation of Section 309(j) of the Communications Act - Competitive Bidding (Further NPRM), FCC 95-263 (released June 23, 1995; Commissioner Barrett's Statement released June 27, 1995).

^{12/} In this regard, MMTC recognizes that the Commission recently proposed to delete minority incentive provisions from the PCS C-Block auction only because time does not permit the Commission to develop a more comprehensive record before the C-Block auction is scheduled to take place. Implementation of Section 309(j) of the Communications Act - Competitive Bidding (Further NPRM), supra, at 2.

**II. A New Minority Ownership Initiative
Meeting The Test Of Adarand**

MMTC and CTF here advance a minority ownership initiative, not heretofore propounded elsewhere, aimed at remedying the effects of housing segregation on opportunities for minority ownership of broadcast stations.

The geographic distribution of minorities throughout the United States, and within urban markets, unnaturally and artificially reflects the evil and long term impact of de jure and de facto housing segregation and discrimination, which continues to confine most minorities as prisoners in inner city ghettos. The unnatural distribution of the minority population has dramatically increased the price minorities pay to purchase radio stations, because radio stations able to provide service to densely populated inner cities are generally far more expensive than stations aimed at outlying areas.

Often the most affordable stations are located in exurban areas. Yet virtually none of these are minority owned, because minority owners generally acquire stations to provide service to their own communities.^{13/} But owing to residential segregation,

^{13/} A review by MMTC of the 222 radio stations owned by African Americans in February, 1995 showed that 158 of them, or 71%, programmed formats (such as urban, Black talk, or Black gospel) aimed at African American populations. (Sources: National Association of Black Owned Breoadcasters (February, 1995 roster) and Broadcasting & Cable Yearbook 1995 (February, 1995)). Thus, African American radio station owners' desire to serve their own communities is not a stereotype; it is a fact. See Metro, supra, 497 U.S at 579-84 (discussing the need to demonstrate that race sensitive policies are not based on stereotypical assumptions).

those wishing to serve urban minority populations can do so only by buying the highest priced stations. The premium they pay is a tax on residential segregation.

The Commission is well aware of the existence of this "tax." Station sale prices must be filed with assignment and transfer applications. For years, the Commission has routinely approved these applications, knowing very well that stations able to serve geographically segregated minorities cost far more than stations serving the exurban areas from which minorities were unlawfully excluded. Yet it has handed out virtually all of the radio broadcasting spectrum without lifting a finger to solve this problem. Thus, the Commission has been deeply involved -- as least as a "passive participant" -- in the exacerbation of the impact of segregation on minority access to the radiofrequency spectrum. That is sufficient to justify remedial, narrowly tailored policies under strict scrutiny. See, e.g., City of Richmond v. J.A. Croson Co., 488 U.S. 469, 492 (1989) ("Croson"); Coral Construction Co. v. King County, 941 F.2d 910, 916 (9th Cir. 1991) ("Coral").

Indeed, the nexus between residential segregation and inadequate broadcast service is no mystery to the Commission. In 1360 Broadcasting Company, 36 FCC 1478, 2 RR2d 824 (Rev. Bd. 1964), the Board refused to waive the (former) AM nighttime service rule to allow a first nighttime service to 98.1% of Baltimore's Black community. Member Joseph Nelson -- years ahead of his time -- dissented, pointing out that the Commission "has granted waivers or found substantial compliance with the rule where coverage was less than 100%" (citing cases, all involving new service to nearly all-White communities, where proposed coverage would have been 90.2%, 95% and 90.6%). Yet the Commission persisted in this

licensing policy, which simply ratified the effects of unlawful residential segregation. See Mel-Lin, Inc., 22 FCC2d 165 (1970), (Jacksonville, Florida) and Champaign National Bank, 22 FCC2d 790 (1970) (Champaign, Illinois). Not until 1976, in a case involving Johnson Publishing Company's WJPC-AM, did the Commission reverse itself, doing so on the basis of promoting minority ownership. Atlass Communications, Inc., 61 FCC2d 995 (1976) (Chicago, Illinois). Unfortunately, by then, most of the valuable FM licenses had already been handed out.^{14/}

Of course the Commission, acting alone, cannot remedy all of the effects of unlawful housing segregation and discrimination.^{15/}

^{14/} This issue also arises on occasion in connection with the EEO Rule when exurban stations seek to waive out of the use of MSAs for calculating minority workforce representation. They are motivated by a desire not to have to recruit inner city minorities, who would then have to commute in the reverse direction from local nonminorities who earn their livings in the central city.

^{15/} Nonetheless, the Commission should always bear in mind that unlike state governments and federal departments which periodically issue construction contracts of the type considered in Adarand, the Commission has essentially completed its task of handing out virtually irrevocable access to an extremely valuable resource for free. It accomplished the bulk of this task at a time in our history when it would have been futile for minorities to seek broadcast permits. As BET's CEO Robert Louis Johnson points out:

In 1934...the Communications Act created access to radio licenses. In 1934 black Americans were still living in a sharecropper, Jim Crow kind of society. Many were still being lynched. But the government, in an affirmative action way, was handing out a government asset - the licenses - to radio stations. Now we're in 1995 and all the communications properties have been awarded. They're now extremely valuable. Blacks cannot economically acquire these assets with the financial position that they have. So the government, I believe, has an obligation - through affirmative action, through preferences - to make up for the fact that we were not players. That's simply what affirmative action is.

"Bob Johnson on the information revolution: All Ahead Slow," Broadcasting and Cable, July 3, 1995, pp. 16, 17.

But it can insure that the victims of that segregation and discrimination are not doubly victimized by being considerably less able than other Americans to receive radio service responsive to their needs and interests.

The Commission can begin by making it easier for minority purchasers or owners of exurban stations to move the stations' towers closer to large cities. Such a policy should be available to minorities who specifically intend to provide new service to minorities confined by residential segregation to the inner city.

This could be done by providing for expediting processing of minorities' move-in applications, favorable construction of minorities' applications to relocate communities of license, and liberal waivers of the third adjacent channel interference rule and the citygrade service requirement, where a minority buyer or owner shows that:

1. Unlawful residential segregation has prevented or continues to prevent minorities in the large city in question from moving to the suburbs and exurbs, where they could enjoy the service of less expensive radio stations;
2. The minority applicant intends to provide new service aimed largely at the problems and needs of the segregated-in residents of the inner city;
3. The minority applicant will ascertain and serve the needs of residents of the city of license as well as the needs of the residents of the inner city, and thus will use the station to promote inter-regional and interracial communication;
4. When a waiver of the citygrade service rule is sought:
 - a. the Grade B contour of the station would still encompass the city of license;
 - b. the city of license would continue to enjoy Grade B quality service from at least two other stations; and

- c. if the minority applicant subsequently sells the station to a nonminority (or to another minority who cannot make the showing and promises recited above), the tower would have to be moved back to a location which allows for citygrade service to the community of license, as had previously been the case.
5. The minority applicant will own the station for at least three years and operate it personally, without allowing it to be LMA'ed with another station unless dire economic straits so require;
6. When the large city's minority population receives at least that proportion of minority owned and formatted radio signals which reflects city-resident minorities' proportional representation in the market's population, no further move-in waivers in that market would be available under this policy; and
7. The move-in will cause no violation of the co-channel, adjacent channel and second adjacent channel rules, apart from those routinely waivable in other cases.

The net effect of this new policy would be more service to highly populated areas, no diminution of service to exurban areas, and a strong incentive for the owners of exurban stations to sell to minorities at reasonable prices. These stations, once relocated, would increase substantially in value, enabling minorities to more easily finance their acquisition and overcome the well known capital formation difficulties faced by virtually all minority entrepreneurs.

This new policy would meet the test of Adarand because:

1. It responds to a compelling state interest;
2. It is narrowly tailored to meet that interest;
3. It would be based on individualized showings;
4. It would be in effect only until it solves the problem for which it was designed;
5. It would be structured to avoid abuse (such as a sale to a nonminority who would then receive a benefit intended for minorities); and

6. It is virtually benign, leaving no nonminorities aggrieved in any meaningful sense. Indeed, owing to the Grade B contour and ascertained needs provisions, virtually no listener or viewer would be harmed, and thus almost no one would have standing to file a challenge. See Hays v. Louisiana, No. 94-558 (U.S., decided June 29, 1995) (nonresidents of congressional district lack standing to bring 14th Amendment challenge to application of Section 5 of the Voting Rights Act).

Furthermore, this initiative could be very effective. Many exurban stations are financial failures because they compete with the large city's high powered signals but are rated below-the-line by Arbitron in the large city's market. Thus, too often, they provide only weak service to the public, utilizing automated facilities rather than live broadcasts. By being able to sell to a minority who could engineer a move-in and revitalize the station, these exurban station owners would receive a much-needed rescue, the minority buyers would have access to a valuable asset otherwise unavailable to them, and the public would receive radio service which is more diverse, more robust, and financially healthy.

Because only a waiver policy is envisioned, necessitating no rule changes, this initiative could be implemented immediately by policy statement. We encourage the Commission to do so without delay.

III. Reply To Initial Comments On The NPRM

In its initial Comments, MMTC demonstrated that there were substantial justifications for the minority ownership policies, including fostering program diversity (MMTC Comments at 4), promoting competition (id.), relief from capital formation barriers (id. at 5) and remedies for discrimination (id. at 6-22). After endorsing the fine-tuning and expansion of the proposals advanced in the NPRM (MMTC Comments at 22-26), MMTC recommended

four additional substantive initiatives: (1) creation of a Minority Media Ownership Trust, to be formed with a portion of the excess of comparative hearing settlements over documented expenses (id. at 26-27) (2) expedited application processing (id. at 27); (3) Section 310(b)(4) waivers to attract alien capital to minority ventures (id. at 27) and (4) the creation of a communications investment bank specializing, inter alia, in minority financing (id. at 28-29).

CTF joined in the Comments filed May 17 by Black Citizens for a Fair Media et al. Those comments extensively documented the underrepresentation of minorities and women in mass media ownership (BCFM Comments at 6-13), advocated increased ownership by women to increase program diversity (id. at 13-26), documented the capital formation rationale for the minority ownership policies (id. at 26-43), and endorsed the Commission's proposed incubator program with a number of modifications, including its expansion to cable (id. at 43-53).

CTF also joined in the May 17 Comments of the Minority Business Enterprise Legal Defense and Education Fund, Inc. et al. Those Comments illustrated the difficulties faced by minority entrepreneurs in obtaining access to capital.^{16/} MBELDEF Comments at 3-6. The MBELDEF Comments also endorsed the Commission's incubator proposal and the creation of a communications investment bank along similar lines as MMTC's proposal. Id. at 7-8.

^{16/} Anecdotal evidence of discrimination must come from within the affected industry. Coral, supra, 941 F.2d at 917. But MBELDEF's Comments are still useful as a precursor of the scope and nature of evidence which, given our experience, the Commission would very likely elicit from similar interviews with minority media entrepreneurs.

Most other commenters also endorsed strengthened minority ownership initiatives. See, e.g., Comments of Qwest Broadcasting L.L.C.; Comments of Silver King Communications, Inc.; Comments of Multicultural Radio Broadcasting, Inc.; Comments of Broadcast Capital Fund, Inc.; Comments of KM Communications, Inc.; Comments of the National Association of Minorities in Cable, Inc.; Comments of U.S. Radio, Inc.; and Comments of the National Association of Black Owned Broadcasters ("NABOB"), (all filed May 17, 1995).

NABOB's Comments are worthy of special note, since they propose creative new initiatives not mentioned in the NPRM. NABOB proposes that the Commission:

1. use forfeiture proceeds, spectrum auction proceeds, and interest from auction deposits to create a minority ownership capital pool;
2. invite the CEOs of the largest radio and TV licensees and financing institutions to a minority ownership summit;
3. require nonminority station owners to demonstrate what they have done to help promote increased minority ownership if they request waivers of the Commission's rules; and
4. deny multiple ownership waiver requests where a sale is promised at a later date unless the buyer commits to sell to a minority.

NABOB Comments at 14-15. MMTC and CTF endorse the first, second and fourth of these proposals without qualification. They are sympathetic to the third NABOB proposal and endorse it subject to its refinement to insure that the showings required of waiver applicants would be appropriately tailored to the scope of the waivers being sought, and would not, in practice, amount to window dressing.

One commenter, Press Broadcasting, Inc. ("Press") apparently opposes any race or gender based policies. Its comments, while

raising familiar canards,^{17/} are unhelpful because they do not suggest how any particular minority ownership program or proposal might be refined to meet any anticipated objections.^{18/} Nor does Press state how the minority ownership policies cause it any material harm. Press' Comments are helpful, however, in pointing out the need for a record on the question of the Commission's involvement in past discrimination.^{19/}

IV. The Commission Should Conduct A Disparity Study

The NPRM does not contemplate that parties will make a full-blown exposition of the compelling nature or narrow tailoring of each of the Commission's several minority ownership initiatives at this time. Indeed, such an exposition would be premature until the Commission has decided which possible approaches to minority ownership are likely to be the most effective.

The caselaw developed after Croson makes it clear that a disparity study, including both anecdotal and statistical evidence,

^{17/} See, e.g., Press' argument that Blacks don't play hockey, a matter irrelevant to any compelling government interest (Press Comments at 2-3); its suggestion that minorities' approach to broadcast service is no different from that of nonminorities (but see Metro, supra, 497 U.S. at 582 n. 34, citing several studies demonstrating minorities' unique and race specific approach to broadcast service, as well as n. 14 herein); and its lengthy treatment of the point that an occasional, extremely rare individual might not choose to identify with a particular race (Press Comments at 5-8)).

^{18/} The burden of showing that a race-based policy is overbroad or otherwise objectionable rests on the objector to that program. Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616, 626 (1987). Thus, the Commission need not consider Press' argument that the Commission's definition of "underrepresentation" is based on the wrong statistics, because Press does not offer alternative statistics or show why the Commission's statistics are inappropriate. See Press Comments at 2.

^{19/} It will be interesting to see what Press has to say about MMTC's initial Comments at 6-22, which set out much of the relevant history at length.

must be conducted if minority incentive programs are to be defended in court. Let's face facts: given the current political climate and the vast funding of the anti-minority right wing, someone will surface to attack each and every policy the Commission currently has in effect or might ever contemplate developing. The Commission must not be so superconfident that it rests on the current record -- extensive though that record may be.^{20/} Neither the friends nor the opponents of these policies should oppose the agency's search for good data concerning them. Unfortunately, given the experience of municipalities in conducting disparity studies after Croson, the record which must be developed requires sustained resources of an order of magnitude not possessed by the financially-strapped civil rights organizations.

Thus is presented the ultimate test of the agency's will and commitment. Does it believe in these policies, and will it detail the necessary staff and appropriate the necessary resources to defend them?

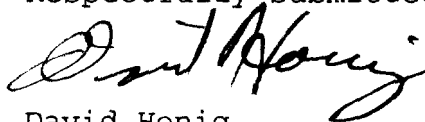
The Commission already has a fairly accurate picture of what a suitable disparity study involves.^{21/} The Commission should therefore proceed on the record before it by:

^{20/} Agencies may rely on post-enactment evidence to justify their minority incentive policies, although they must -- as the FCC did -- develop those policies in the first instance based on some significant evidence of remediable harm. See Coral, supra, 941 F.2d at 920-21.


^{21/} See Office of the General Counsel, Agenda for Adarand Meeting, July 5, 1995; see also Hon. Walter Dellinger, Assistant Attorney General, U.S. Department of Justice, "Memorandum to General Counsel re Adarand," June 28, 1995.

1. Issuing a First Report and Order, in which the Commission would decide, purely as a matter of policy, which of the existing minority ownership policies and new proposals are most likely to be effective and worthy of defense;
2. Continue all existing policies in effect, and adopt any promising new policies likely to be effective;
3. Issue a Notice of Inquiry, seeking comments on how to structure an omnibus disparity study aimed at both media and telecommunications;
4. Issue an RFP and seek a contractor on an expedited basis for that part of the research which is best accomplished by outside experts; and
5. Conduct the disparity study and prepare to defend all of its policies "by any means necessary."

Respectfully submitted,



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